Supreme Court of the United States

In the Matter

of

EDGAR S. APPLEBY and JOHN S. APPLEBY,

Petitioners,

For a Writ of Mandamus,

against

JOHN H. DELANEY, as Commissioner of Docks of the City of New York.

Brief in opposition to petition for Writ of Certiorari.

STATEMENT.

(References are made to the Record before the Court of Appeals of the State of New York).

This case grows out of the case of *Appleby* vs. *The City of New York et al*, submitted herewith. The property involved and the petitioners are the same in both cases.

After the decision in *Appleby* vs. *The City of New York* by the court of first instance, the petitioners applied to the commissioner of docks of the City of New York, who had jurisdiction over such matters, for a permit to fill in the areas between the present line of solid filling and the bulkhead line established by the Secretary of War in 1890. The commissioner of docks refused the permit on the ground that a bulkhead line had been established by the State authorities 100 feet farther inshore than the line of the Secretary of War (fols. 194-195; see map opposite p. 59). It was his contention that no filling beyond the State's new bulkhead line could properly be made.

The Court of Appeals of New York has held in this case that the dock commissioner was wrong in his interpretation of the effect of the State's bulkhead line. Judge Pound, writing for the Court, said:

> "The City established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirtenth Avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the Secretary of War." 235 N. Y., p. 365.

The Court held, however, that permission to fill was properly refused, for the reason that the ordinance of the City of New York which authorize the grants to petitioners' predecessors provided:

"No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

It was not claimed that the petitioners had obtained the consent of the common council or its successor in authority. Without such consent, the Court held, the petitioners could not fill any portion of the lands granted.

POINT I.

No Federal question is involved.

It seems plain that the decision of the Court of Appeals of New York was not based on any act of legislation of the State of New York passed subsequent to the grants in question. The decision was purely one of the construction, meaning, and intention of the grants. It has many times been held that the provision of the constitution with respect to impairment of contract refers to impairment *by an act of legislation* and not by judicial decision.

> *Ross* vs. *Oregon*, 227 U. S. 150, 161;
> *Moore-Mansfield Co.* vs. *Electrical Install. Co.*, 234 U. S. 619, 624 to 625;
> *Cleveland, Pittburgh R. Co.* vs. *Cleveland*, 235 U. S. 50.

Furthermore, there has been no change in decision by the State Courts. The petitioners claim that the Court of Appeals has overruled

its prior decision in *Duryea* vs. *The Mayor* 96 N. Y. 477. The *Duryea* case was twice before the Court of Appeals. Upon the first appeal (62 N. Y. 592) the Court had before it a grant similar to those made to petitioners' predecessors. The Court construed this grant without reference to the provisons of the ordinance above referred to, the ordinance not having been called to the Court's attention. On the basis of the language of the grant alone, the Court held that the permission of the common council was not required to enable the grantee to fill in *the spaces between the streets.*

Upon the second appeal (96 N. Y. 477), the ordinance authorizing the grants was before the Court. The Court recognized the proposition that, if there was any difference between the provision of the ordinance and that of the grant, the ordinance must prevail, as that was the authority under which the grant was made. Two questions were then considered; first, whether the common council had in fact consented to the filling of the lands; and second, the effect of the ordinance. The Court squarely held (96 N. Y. pp. 493, 498), that the common council had consented to the filling of the space between the streets, and that the ordinance had thus been complied with. This, of course, made the question of the effect of the limitation contained in the ordinance more or less academic. The Court proceeded to discuss the question, however, and stated among other things:

> "It may very well be doubted whether the construction formerly given by this Court

> to the covenants contained in the deed should not also be deemed applicable to the provision of the sinking fund ordinance." (96 N. Y. p. 494).

The point, however, was not definitely passed upon, for, in stating its final conclusions, at page 498, the Court did not refer to it.

Judge Pound, therefore, was clearly right in the case at bar when, referring to the ordinance, he stated:

> "We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission." 235 N. Y., at page 367.

With respect to the failure to plead the ordinance upon which the Court relied, it is the law of New York that Courts sitting in the City of New York must take judicial notice of city ordinances.

> *People ex rel. Broadway Co.* vs. *Waldron* 183 N. Y. App. Div. 807.

While the Court of Appeals does not sit in the City of New York, still, in reviewing decisions of Courts in that City, it must, of course, consider all that the Courts below were required to consider. Furthermore, the ordinance in question was ratified and made non-repealable by an act of the legislature (Chapter 225 of the Laws of New York of 1845, Section 5) of which the Court could take notice. This act provided as follows:

> "Section 5: The ordinance now in force and approved of by the mayor of said city on the twenty-second day of February, 1844, and any ordinance that may hereafter be passed by the said the mayor, aldermen and commonalty of the city of New York, in conformity with the provisions of this law, and relative to the said sinking fund, shall not be amended without the consent of the legislature first had and obtained, except by setting apart and appropriating to and for the purposes of said sinking fund additional revenue whenever the said the mayor, aldermen and commonalty shall deem proper; and the said ordinance shall remain in full force until the whole of the debt created for the introduction of the croton water into the city of New York shall be fully redeemed."

The other suggested errors in the decision of the Court of Appeals are likewise merely questions of local law.

The petition for the writ of certiorari herein should be denied.

New York, September , 1923.

Respectfully submitted,

GEORGE P. NICHOLSON,
Corporation Counsel.
Atorney for The City of New York.

CHARLES J. NEHRBAS,
of Counsel.

(15)

(20176)

Supreme Court of the United States

OCTOBER TERM, 1925—No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,
Plaintiffs-in-error,

against

JOHN H. DELANEY, as Commissioner of Docks of The City of New York,
Defendant-in-error.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

GEORGE P. NICHOLSON,
Corporation Counsel.

CHARLES J. NEHRBAS,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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against

JOHN H. DELANEY, as Commissioner of Docks of the City of New York,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF ON BEHALF OF THE DEFENDANT-IN-ERROR.

In addition to the writ of error, the plaintiffs-in-error filed, at the October 1923 term, a petition for a writ of certiorari. The Court deferred consideration of such petition until the hearing upon the writ of error.

The plaintiffs-in-error seek to review a final order of the New York Supreme Court (R., p. a) entered after the reversal by the Court of Appeals of New York (R., pp. b to c) of an order of an intermediate appellate tribunal (R., pp. 69

to 71), which in turn had reversed a final order of the Special Term of the Supreme Court (R., pp. 3 to 4).

The final order sought to be reviewed denies an application of the plaintiffs-in-error for a writ of mandamus.

Statement of the Case.

This case grows out of the case of *Appleby* v. *City of New York* (No. 15, October Term, 1925) to be argued herewith. The plaintiffs-in-error and the property involved are the same in both cases.

After the decision in *Appleby* v. *The City of New York* by the court of first instance, the plaintiffs applied to the commissioner of docks of the City of New York, who had jurisdiction over such matters, for a permit to fill in the areas between the present line of solid filling and the bulkhead line established by the Secretary of War in 1890 (R., pp. 24-34). The commissioner of docks refused the permit on the ground that a bulkhead line had been established by the State authorities 100 feet farther inshore than the line of the Secretary of War (R., pp. 64, 65) (see map, p. 58). It was his contention that no filling beyond the State's new bulkhead line could properly be made.

The Court of Appeals of New York has held in this case that the dock commissioner was wrong in his interpretation of the effect of the State's bulkhead line. Judge Pound, writing for the Court, said:

> "The City established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth Avenues. It was held in the

> action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the Secretary of War." 235 N. Y., p. 365.

This determination apparently proceeded on the theory that the establishment of a bulkhead line by the Secretary of War was an act of paramount authority which prevented any inconsistent regulation by the authorities of the state.

The Court held, however, that permission to fill was properly refused, for the reason that the ordinance of the City of New York which authorized the grants to plaintiffs' predecessors provided:

> "No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

It was not claimed that the plaintiffs had obtained the consent of the common council or its successor in authority. Without such consent, the Court held, the plaintiffs could not fill any portion of the lands granted.

POINT I.

No Federal question is involved.

It seems plain that the decision of the Court of Appeals of New York was not based on any act of legislation of the State of New York passed subsequent to the grants in question. The decision was purely one of the construction, meaning, and intention of the grants. It has many times

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Furthermore there has been no change in decision by the State Courts. The plaintiffs claim that the Court of Appeals has overruled its prior decision in *Duryea* vs. *The Mayor*, 96 N. Y. 477. The *Duryea* case was twice before the Court of Appeals. Upon the first appeal (62 N. Y. 592) the Court had before it a grant similar to those made to plaintiffs' predecessors. The Court construed this grant without reference to the provisions of the ordinance above referred to, the ordinance not having been called to the Court's attention. On the basis of the language of the grant alone, the Court held that the permission of the common council was not required to enable the grantee to fill in *the spaces between the streets*.

Upon the second appeal (96 N. Y. 477), the ordinance authorizing the grants was before the Court. The Court recognized the proposition that, if there was any difference between the provision of the ordinance and that of the grant, the ordinance must prevail, as that was the authority under which the grant was made. Two questions were then considered; first, whether the common council had in fact consented to the filling of the lands; and second, the effect of the ordinance. The Court squarely held (96 N. Y., pp. 493, 498), that the common council had consented to the filling of the space between the streets, and that the

ordinance had thus been complied with. This, of course, made the question of the effect of the limitation contained in the ordinance more or less academic. The Court proceeded to discuss the question, however, and stated among other things:

> "It may very well be doubted whether the construction formerly given by this Court to the covenants contained in the deed should not also be deemed applicable to the provision of the sinking fund ordinance" (96 N. Y., p. 494).

The point, however, was not definitely passed upon, for, in stating its final conclusions, at page 498, the Court did not refer to it.

Judge Pound, therefore, was clearly right in the case at bar when, referring to the ordinance, he stated:

> "We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission." 235 N. Y., at page 367.

With respect to the failure to plead the ordinance upon which the Court relied, it is the law of New York that Courts sitting in the City of New York must take judicial notice of city ordinances.

People ex rel. Broadway Co. vs. *Waldron*, 183 N. Y. App. Div. 807.

While the Court of Appeals does not sit in the City of New York, still, in reviewing decisions of Courts in that City, it must, of course, consider all that the Courts below were required to consider. Furthermore, the ordinance in question was ratified and made non-repealable by an act of the legislature (Chapter 225 of the Laws of New York of 1845, Section 5) of which the Court could take notice. This act provided as follows:

> "Section 5: The ordinance now in force and approved of by the mayor of said city on the twenty-second day of February, 1844, and any ordinance that may hereafter be passed by the said the mayor, aldermen and commonalty of the city of New York, in conformity with the provisions of this law, and relative to the said sinking fund, shall not be amended without the consent of the legislature first had and obtained, except by setting apart and appropriating to and for the purposes of said sinking fund additional revenue whenever the said the mayor, aldermen and commonalty shall deem proper; and the said ordinance shall remain in full force until the whole of the debt created for the introduction of the croton water into the city of New York shall be fully redeemed."

The other suggested errors in the decision of the Court of Appeals are likewise merely questions of local law.

The final order should be affirmed.

New York, October, 1925.

Respectfully submitted,

GEORGE P. NICHOLSON,
Corporation Counsel.

CHARLES J. NEHRBAS,
Of Counsel.

(5656)

(16)

Supreme Court of the United States,

OCTOBER TERM, 1925—No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,
Plaintiffs in error,

against

JOHN H. DELANEY, as Commissioner of Docks of The City of New York,
Defendant in error.

BRIEF FOR DEFENDANT IN ERROR ON REARGUMENT.

CHARLES J. NEHRBAS,
Counsel for Defendant in error.

(20282) Stillman Appellatte Printing Co.

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Supreme Court,

OF THE UNITED STATES,

OCTOBER TERM, 1925—No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,
Plaintiffs in error,

against

JOHN H. DELANEY, as Commissioner of Docks of the City of New York,
Defendant in error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

(Reported below, 235 N. Y., 364; 199 N. Y., App. Div., 552.)

BRIEF FOR DEFENDANT IN ERROR ON REARGUMENT.

This case was argued before the Court on October 7, 1925, and, on November 16, 1925, the Court directed that it be restored to the docket for reargument.

The plaintiffs in error seek to review a final order of the New York Supreme Court (R., p. a.) entered after the reversal by the Court of Appeals of New York (R., pp. b to c) of an order of an intermediate appellate tribunal (R., pp. 69 to 71), which in turn had reversed a final order of the Special Term of the Supreme Court (R., pp. 3 to 4.)

The final order sought to be reviewed denies an application of the plaintiffs in error for a writ of mandamus.

Statement of the Case.

This case grows out of the case of *Appleby vs. City of New York* (No. 15, October Term, 1925) to be argued herewith. The plaintiffs in error and the property involved are the same in both cases.

After the decision in *Appleby vs. The City of New York* by the Court of first instance, the plaintiffs applied to the commissioner of docks of the City of New York, who had jurisdiction over such matters, for a permit to fill in the areas between the present line of solid filling and the bulkhead line established by the Secretary of War in 1890 (R., pp. 24-34). It does not appear that they offered to build the streets.

The commissioner of docks refused the permit on the ground that a bulkhead line had been established, in 1916, by the State authorities 100 feet farther inshore than the line of the Secretary of War (R., pp. 64, 65) (see map, p. 58). It was his contention that no filling beyond the State's new bulkhead line could properly be made.

The plaintiffs then presented a petition (R., pp. 7 to 63) to the Supreme Court of New York for the issuance of a writ of mandamus, requiring the dock commissioner to issue to them a permit to

improve the property in the manner set forth in their application to the commissioner.

An affidavit of the commissioner was submitted in opposition to plaintiffs' petition (R., pp. 64-65).

The court of first instance (the Special Term of the Supreme Court) denied the plaintiffs' motion (R., pp. 3 to 4). The plaintiffs appealed to the Appellate Division of the Supreme Court, and upon this appeal the order of the court below was reversed, and the writ of mandamus was directed to issue (R., pp. 69-70). The commissioner then appealed to the Court of Appeals, which court reversed the order of the Appellate Division, and affirmed the order of the Special Term (R., pp. b to c). Upon the remittitur of the Court of Appeals, an order was entered at the Special Term of the Supreme Court (R., pp. a to b) which finally determined the proceeding, and which is the order sought to be reviewed.

The Court of Appeals has held in this case that the dock commissioner was wrong in his interpretation of the effect of the State's bulkhead line. Judge Pound, writing for the Court, said:

> "The City established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth Avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the Secretary of War." 235 N. Y., p. 365.

This determination apparently proceeded on the theory that the establishment of a bulkhead line by the Secretary of War was an act of paramount authority which prevented any inconsistent regulation by the authorities of the State.

Compare

Peo. vs. Hudson River Connecting R. R. Co., 228 N. Y., 203.

The court held, however, that permission to fill was properly refused, for the reason that the ordinance of the City of New York, adopted in 1844, which authorized the grants to plaintiffs' predecessors, provided:

> "No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

It is not claimed that the plaintiffs have obtained the consent of the common council to the making of the lands in question, nor, indeed, that they have so much as applied to the common council for such permission. It was for that reason, and for that reason only, that the plaintiffs were denied the relief they sought.

POINT I.

No Federal question is involved.

It seems plain that the decision of the Court of Appeals of New York was not based on any act of legislation of the State of New York passed subsequently to the grants in question. The decision was purely one of the construction, meaning, and intention of the grants. It has many times been

held that the provision of the constitution with respect to impairment of contract refers to impairment *by an act of legislation* and not by judicial decision.

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Cleveland, Pittsburgh R. Co. vs. Cleveland, 235 U. S., 50;
Tidal Oil Co. vs. Flanagan, 263 U. S., 444;
Fleming vs. Fleming, 264 U. S., 29.

It is not true, as claimed by the plaintiffs, that the New York courts have given effect to the limitation attempted to be provided by the new bulkhead line of 1916. On the contrary, the Court of Appeals has expressly held that the rights of the plaintiffs are not limited by that line. The sole ground of the decision is that the grants from the City to the plaintiffs' predecessors in title, construed in the light of the ordinance pursuant to which they were made, required the permission of the common council of the City of New York before any filling could be done.

The plaintiffs claim that the Court of Appeals has overruled its prior decision in *Duryea vs. The Mayor*, 96 N. Y., 477. The *Duryea* case was twice before the Court of Appeals. Upon the first appeal (62 N. Y., 592) the court had before it a grant similar to those made to plaintiffs' predecessors. The court construed this grant without reference to the provisions of the ordinance above referred to, the ordinance not having been called to the court's attention. On the basis of the language of the grant alone, the court held that the permission of

the common council was not required to enable the grantee to fill in *the spaces between the streets.*

Upon the second appeal (96 N. Y., 477), the ordinance authorizing the grants was before the court. The court recognized the proposition that, if there was any difference between the provision of the ordinance and that of the grant, the ordinance must prevail, as that was the authority under which the grant was made. Two questions were then considered; first, whether the common council had in fact consented to the filling of the lands; and second, the effect of the ordinance. The court squarely held (96 N. Y., pp. 493, 498), that the common council had consented to the filling of the space between the streets, and that the ordinance had thus been complied with. This, of course, made the question of the effect of the limitation contained in the ordinance more or less academic. The court proceeded to discuss the question, however, and stated among other things:

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The point, however, was not definitely passed upon, for, in stating its final conclusions, at page 498, the court did not refer to it.

Judge Pound, therefore, was clearly right in the case at bar when, referring to the ordinance, he stated:

> "We are free to interpret the clause according to its meaning. To construe the ordinance

> and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission." 235 N. Y., at page 367.

The plaintiffs concede that, under their grants, they have not the right to fill in and construct the streets without the consent of the common council. They asked the court, however, to hold that this limitation did not apply to the filling of the spaces between the streets. The court refused to accede to a proposition so absurd. If the plaintiffs were right, they might fill in the areas between the streets and thus construct islands which would be surrounded by canals. It is utterly unreasonable to suppose that the maker of the grants intended any such result.

It must be understood that the common council has not at any time refused its permission to the improvements sought to be made by the plaintiffs. No application for such permission has ever been made. The application to the commissioner of docks was not an application for the permission required by the grants and the ordinance. It cannot be determined what the attitude of the common council will be until the plaintiffs make formal application pursuant to the terms of the ordinance.

The questions relating to the conclusions of law made by the Appellate Division in *Appleby vs. The City of New York* (No. 15) and their effect upon the determination of this proceeding, have been discussed under Point V of the brief in No. 15.

The final order should be affirmed.

New York, January 27, 1926.

Respectfully submitted,

CHARLES J. NEHRBAS,
Counsel for defendnet in error.

Supreme Court of the United States,

OCTOBER TERM, 1925—No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors of Charles E. Appleby, deceased,
Plaintiffs in error,

against

THE CITY OF NEW YORK, *et al.*,
Defendants in error.

BRIEF FOR DEFENDANTS IN ERROR ON REARGUMENT.

CHARLES J. NEHRBAS,
Counsel for Defendants in error.

(20282) Stillman Appellatte Printing Co.

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OF THE UNITED STATES,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

(Reported below, 235 N. Y., 351; 199 N. Y. App. Div., 539).

BRIEF FOR DEFENDANTS IN ERROR ON REARGUMENT.

This case was argued before the court on October 7, 1925, and, on November 16, 1925, the court directed that it be restored to the docket for reargument.

Plaintiffs in error seek to review a judgment of the Supreme Court of the State of New York (R., pp. 551-552) entered upon an order of the Appellate Division of that court (R., pp. 549-551). The judgment so entered has been affirmed by the Court of Appeals of New York (R., pp. b-c). The order of the Court of Appeals affirming the judgment below has been, according to the practice, made the order and judgment of the Supreme Court (R., pp. a-b).

The judgment sought to be reviewed modifies and affirms a judgment of the Special Term of the Supreme Court (R., pp. 201-203) and enjoins the defendants in error from interfering in certain particulars with the property of plaintiffs in error, but substantially denies the relief demanded in the complaint.

Statement of the Case.

Plaintiffs in error, claiming to be the owners "in fee simple absolute" of certain lands under water between 39th and 40th Streets, and between 40th and 41st Streets, outshore of Twelfth Avenue, in the Borough of Manhattan, City of New York, brought this action,

(a) to restrain the defendants from mooring, docking or floating vessels over the lands under water, and from dredging:

(b) to require the removal of certain piers, sheds, etc., at the foots of 39th, 40th, and 41st Streets.

The plaintiffs also demand money damages (see Complaint, R., pp. 9-61).

The City of New York answered (R., pp. 62-84) denying the material allegations of the complaint, and setting up the establishment of harbor lines

affecting the premises in question, the statute of limitations, adverse possession, and the failure of the plaintiffs to comply with the conditions contained in their grants from the City.

The premises in question are under the waters of the Hudson River, on the westerly side of Manhattan Island.

By Chapter 182 of the Laws of New York of 1837, Thirteenth Avenue, as laid out on a certain map made by George B. Smith was declared to be the permanent exterior street or avenue in the City of New York, along the easterly shore of the Hudson River, between the southerly line of Hammond Street and the northerly line of 135th Street. The avenue was laid out beyond the shore line, over the waters of the river, and the City of New York was vested with all the right and title of the people of the State to the lands under water extending from the westerly line of the lands theretofore granted to the westerly line of Thirteenth Avenue as so laid out (R., pp. 172-174).

The title to the premises in question was thus vested in the City of New York. This is alleged in the complaint (R., pp. 12-13) and is not disputed.

On or about the 24th day of December, 1852, the City issued to one Robert Latou a water grant covering lands under water between Fortieth and Forty-first Streets from the high water mark of the Hudson River out to Thirteenth Avenue, established by Chapter 182 of the Laws of 1837 (Pltff.'s Ex. 5; R., pp. 378-387; Finding, R., pp. 182-191).

The grant contains the following pertinent provisions:

> "Saving and reserving from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portions

of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned" (R., p. 381).

"And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted, or that may hereafter be be passed or adopted, four good and sufficient Bulk-heads, Wharves, Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and Fortieth and Forty-first Streets as fall within the limits of the premises first above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof" (R., pp. 381-382).

"And it is hereby further convenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof, is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets

herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose" (R., p. 384).

"And it is hereby further agreed by and between the parties to these presents, and the true intent and meaning hereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or seizen, of said parties of the first part or their successors or to operate further than to pass the estate right, title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York" (R., pp. 385-386).

Subsequently, on the first day of August, 1853, a similar grant was issued to Charles E. Appleby of the lands under water between Thirty-ninth and Fortieth Streets, from the high water mark out to Thirteenth Avenue (R., pp. 367-377; Finding, p. 191).

The title of the plaintiffs comes down from these grants (R., pp. 191-192).

The manifest purpose of these grants was to extend the shore line of the City to the westerly

side of Thirteenth Avenue. The grantees were to do all of the work of filling in and building bulkheads; they were also forever to maintain and keep in repair the streets and bulkheads (R., p. 382). This was the real consideration for the making of the grants. Upon completion of the work, the grantees were to be the owners of the lands between the streets. The beds of the streets were to be owned by the City of New York.

It was also provided that the grantees were to have the rights of wharfage, cranage, etc., appurtenant to the portion of the exterior line of the City opposite the premises granted, except that the City was to exercise such rights at the foots of the streets (R., p. 385). Rights of this character are commonly dominated bulkhead rights, and constitute a species of incorporeal hereditament.

See

Matter of Pier 49, E. R., 185 N. Y., App. Div., 539, 543; 227 N. Y., 119.

The contemplated scheme of development was frustrated by the Secretary of War when, in 1890, acting under authority of Congress, he established a bulkhead line, or line of solid filling, parallel with and 150 feet to the west of the westerly line of Twelfth Avenue (R., p. 193), which is a considerable distance east of Thirteenth Avenue. The Secretary has also established a pierhead line 700 feet west of the bulkhead line. The pier line is beyond Thirteenth Avenue, and wholly outshore of the premises in controversy (R., p. 182; see map at p. 529).

Pursuant to the provisions of Section 6 of Chapter 574 of the laws of New York of 1871, certain officials, acting on behalf of the State of New York,

adopted a plan for the improvement of the waterfront at the locality in question, by which plan a bulkhead line or line of solid filling was established coincident with the bulkhead line of the Secretary of War (R., p. 193). The plan of the State authorities also provided for a pierhead line 500 feet beyond the bulkhead line, and for piers 80 feet in width at the foots of 39th, 40th and 41st Streets, extending from the bulkhead line to the pierhead line, and for slips or basins between the piers (Ex. 11, p. 391).

By the establishment of the bulkhead line, under authority of both the Federal and State governments, a limit was placed upon the extent to which anyone might place solid filling in the waters of the River, and by the adoption of the plan providing for the location and widths of the piers, a limit was placed upon the right to erect such structures.

The plaintiffs or their predecessors in title have made the streets and filled in the lands, as provided in the grants from the City, as far out as the easterly or inshore line of Twelfth Avenue (R., p. 177). The land so filled is not here in controversy. Beyond the easterly line of Twelfth Avenue, the land granted is still under water. The plaintiffs have done no filling beyond that line, nor have they built any part of Twelfth Avenue, Thirteenth Avenue nor the portions of the side streets between those avenues. The controversy deals with the lands thus left submerged.

The City of New York, at its own expense, has built piers at the foots of 39th, 40th and 41st Streets, as provided for in the plan heretofore referred to (R., pp. 180, 181, 192). The land under water covered by these piers was reserved from the grants made to plaintiffs' predecessors (R., pp. 368, 381). The City has leased these piers and its les-

sees have been mooring vessels at the sides of the piers over the plaintiffs' land under water (R., pp. 465-487). The City has also dredged the spaces between the piers to facilitate the navigation of vessels (R., p. 181). The floating of vessels over plaintiffs' land under water and the dredging of the slips constitute the injuries complained of.

In the court of original jurisdiction, the Special Term of the Supreme Court, the City was enjoined from dredging the slips and from doing other acts not now in controversy (R., p. 202). The opinion of the Special Term is printed at pages 356-362).

Both parties appealed to the Appellate Division of the Supreme Court, where the judgment was modified by eliminating the provision enjoining the City from dredging west of the established bulkhead line, and in all other respects affirmed (R., pp. 551-552). The opinion of the Appellate Division is printed at pages 555-563 and is reported in 199 N. Y. App. Div., 539.

Both parties again appealed to the Court of Appeals, where the judgment was affirmed (R., pp. b-c). The opinion of the Court of Appeals is printed at pp. 565-569 and is reported in 235 N. Y., 351.

Summarizing the situation, we find that the City of New York, deriving its title from the State, has granted to the plaintiffs' predecessors the land under water between 39th and 40th Streets, and between 40th and 41st Streets, and has reserved to itself the land under water within the prolonged lines of the streets. A bulkhead line has been established by concurrent action of the Federal and State authorities, which limits solid filling at a point 150 feet west of Twelfth Avenue. Beyond the bulkhead line, and within the pierhead line established by the Federal Government, the State has provided that piers shall be built only within

the prolonged lines of the streets. The State's regulation permits the building of piers on the City's property and prohibits the building of any structures on the plaintiffs' property beyond the bulkhead line. The City has built the piers on its property. The waters covering the plaintiffs' intervening property, beyond the bulkhead line, are part of the navigable waters of the river. The courts of New York have held that these waters may be navigated by vessels making fast to the City's piers, and may be dredged to facilitate navigation.

POINT I.

The acts of the State do not amount either to a taking of property or the impairment of the obligation of a contract.

The courts of New York have held that the title of the City of New York and of its grantees to the land under the waters of Hudson River is not absolute and unqualified, but is subject to such regulations as the public authorities may impose respecting the use of the water front.

This has been the uniform course of adjudication upon this subject in the State of New York for many years. For example, in *Knickerbocker Ice Co. vs. 42nd St. R. R. Co.*, 176 N. Y., 408, the court wrote as follows:,

> "There are several fundamental facts which must be kept in view in the effort to adjust the rights of the parties to this litigation. *First:* The title of the City of New York in the tideway and submerged lands of the Hudson River granted under the Dongan and Montgomerie

charters and the acts of the legislatures of 1807, 1826 and 1837, was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway. (*Sage vs. Mayor, etc. of N. Y.*, 154 N. Y., 70; *Matter of City of N. Y.*, 168 N. Y., 139.) *Second:* The title of the City of New York in and to the lands within its public streets is held in trust for the public use. (*Story vs. N. Y. El. R. R. Co.*, 90 N. Y., 122; *Kane vs. N. Y. El. R. R. Co.*, 125 N. Y., 165). *Third:* The general public has a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is by operation of law extended by the length of the added structure. (*People vs. Lambier*, 5 Denio, 9; *Matter of City of Brooklyn*, 73 N. Y., 179). *Fourth:* It was competent for the legislature in granting additional submerged lands to the City of New York in 1837, to prescribe that such lands should be used for the purposes of an exterior street, to which other streets then intersecting the river should be extended."

176 N. Y., p. 417.

In

American Ice Co. vs. City of New York,
217 N. Y., 402,

the same property was involved as in the case of *Knickerbocker Ice Co.* (*supra*). The court's opinion contains the following discussion of the nature of the property rights in the land under water:

"A large number of the facts found relating to the title and interest of the City were reviewed by this court in the earlier cases (*Knickerbocker Ice Company vs. 42nd Street & G. St. F. R. R. Co.*, 176 N. Y., 408; *Matter of Mayor, etc. of N. Y.*, 195 N. Y., 503) wherein it was determined that the title of the City of New York in the tideway and the submerged lands of the Hudson River granted under the Dongan and Montgomerie charters and the acts of the legislature (Laws of 1807, chapter 115; Laws 1837, chapter 182), and by grants made by the State to the City was not absolute and unqualified, but was and is held subject to the rights of the public to the use of the river as a water highway; that the title of the City of New York in and to the lands within its public streets (including Forty-third Street to which the City acquired title in 1837-1838, and was opened from the East River to the high-water mark of the Hudson River, sixty feet in width), is held in trust for the public use; that the general public has a right of passage over the places where land, highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is, by operation of law, extended by the length of the added structure; that it was competent for the legislature in granting additional submerged lands to the City of New York in 1837 to prescribe that such lands should be used for the purposes of an exterior street to which other streets then intersecting the river should be extended. (*Knickerbocker Ice Company vs. 42nd Street & G. St. F. R. R. Co.*, 176 N. Y., 408, 417)."

217 N. Y., pp. 405, 406.

> "The title of the State to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the State is powerless to divest itself."
>
> *Core vs. State*, 144 N. Y., at pp. 405-406.

Moreover, the case at bar finds an exact precedent in *People vs. N. Y. & S. I. Ferry Co.*, 68 N. Y., 71. In that case the defendant claimed lands under water under a grant made by the State, pursuant to certain acts of the legislature. Before the defendant had constructed any improvements, the legislature passed a law providing that no pier might be built within 100 feet of another pier. The defendant constructed a pier upon the land granted to it, within 100 feet of a similar structure upon the adjoining property. The Court of Appeals held that the construction of such pier was in violation of the State law, and that the State might require its removal. From the opinion of the court, we quote the following:

> "The grant to Gore contained no words excluding the exercise by the State of governmental control of the waters above the land granted as a public highway, and if, in exercising this control, the grantee is restricted in the use of his property, it is not in contravention of the grant, but consistent with it, because the grant, by well settled words of construction was subject to the exercise of this right and attribute of sovereignty. We need

not inquire what the rights of a grantee would be in respect to piers and wharves, erected under the license implied from the grant before it had been revoked, or the State had, in the exercise of its discretion, made regulations upon the subject.

"The legislature, by chapter 763 of the Laws of 1857, entitled 'An act to establish bulkhead and pier lines for the port of New York,' established pier and bulkhead lines for the port and harbor of New York which included the premises granted to Gore. The second section is as follows: 'It shall not be lawful to fill in with earth or other solid material in the waters of said port beyond the bulkhead line, or line of solid filling hereby established, nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea wall mentioned in the first section of the act, and piers which shall not exceed seventy feet in width respectively with intervening water spaces of at least 100 feet, nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond or outside of said sea wall.'

"When this act was passed no piers had been erected on the Gore grant, and so far as appears, there was unity of title as to the whole tract embraced therein. This act was a lawful exercise of legislative power, as a regulation for the benefit of commerce and navigation, and the owners of the Gore grant were bound to observe it, and in erecting piers to conform to its directions."

68 N. Y., at pp. 79-80.

See also,

> *Coffin vs. Scott*, 19 Weekly Dig., 413; aff'd. 102 N. Y., 730 (opinion printed as appendix to our brief upon the original argument).

The plaintiffs contend that a different rule is to be found in other cases decided by the Court of Appeals, for example, *Langdon vs. The Mayor*, 93 N. Y., 129, and *Williams vs. The Mayor*, 105 N. Y., 419. In these and similar cases it appeared that the lands granted *had been fully filled in*, and had thus ceased to be within the domain of the regulatory power over navigable waters. These decisions apply, for example, to the land of the plaintiffs east of Twelfth Avenue, which we admit neither the State nor the City has the power to disturb.

The plaintiffs also refer to the case of *People vs. Steeplechase Park Co.*, 218 N. Y., 459. It was there held that the State has the power to convey such title to the foreshore as will permit the grantee to erect structures which prevent the passage of the public. There is nothing in that case which is inconsistent with our contention in the case at bar. It did not involve the question of the State's regulatory power. It does not follow, from anything that was said in that case, that the grantee would not have been obliged to conform his improvement of the lands granted to any harbor lines which might have been established.

We do not claim that the plaintiffs did not acquire a fee. They acquired as great a title as an individual can have in lands under navigable waters. But something more than a mere conveyance of the lands is required before it can be argued that the State has surrendered its power of regulation.

In the case at bar, Judge Pound, referring to this line of cases, said:

> "If plaintiffs' lands easterly of the bulkhead line had been actually filled in they would no longer be lands under water and would be free from the regulatory power of the State (*First Construction Co. vs. State*, 221 N. Y., 295), but so long as they remained under water they were subject to the sovereign power of the State to regulate their use for purposes of navigation. * * *
>
> "Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is *dictum* (*People vs. Steeplechase Park Co.*, 218 N. Y., 459; *Langdon vs. Mayor*, 93 N. Y., 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for private purposes (Citing cases)" 235 N. Y., at pages 361-362.

Under these decisions, it seems clear that the plaintiffs hold the property subject to the regulation of its use by the Secretary of War and the State authorities.

The regulation of the use of land under navigable waters ordinarily takes the form of establishing harbor lines, bulkhead lines to limit the extent of solid filling, and pier lines to limit the extent, width and location of piers.

As we have stated, the Secretary of War, acting under the authority of Congress, in 1890, established a bulkhead line 150 feet west of the westerly side of Twelfth Avenue, and approximately 250 feet west of the present line of solid fill. The plaintiffs concede that they are bound by this line and may not fill beyond it. This concession is based upon numerous decisions of this court, some of which are

Scranton vs. Wheeler, 179 U. S., 141, 163;
Cummings vs. Chicago, 188 U. S., 410;
Calumet Grain Co. vs. Chicago, 188 U. S., 431;
Phila. Co. vs. Stimson, 223 U. S., 605;
Greenleaf Lumber Co. vs. Garrison, 237 U. S., 251.

The courts of New York have restrained the City and the other defendants from interfering with the plaintiffs' rights inshore of the bulkhead line (R., pp. 551-552), and the defendants do not seek to review such determination. It thus appears that the controversy in the present case deals entirely with the land under water outshore of the bulkhead line.

The only regulation by the Federal government outshore of the bulkhead line is the pierhead line established by the Secretary of War, a considerable distance beyond the lands in controversy (R., p. 182, maps, pp. 529, 531). This is a line limiting the outer extremity of the piers to be built. The plaintiffs base no complaint upon the establishment of such line.

Plaintiffs' sole ground of complaint is the establishment, by the State authorities, inshore of the Federal pier line, of limitations respecting the

width and location of piers. The plan adopted by the State provides for piers at the foots of the streets, and for slips between the piers. The plaintiffs complain that they are thus deprived of their property, and that their contract rights have been impaired.

This court has held that a State has the power to restrict the building of piers and wharves where the Federal government has made no restrictions, or where the State's regulations do not conflict with those of the United States.

Montgomery vs. Portland, 190 U. S., 89.

Manifestly, there must be some regulation of the width of piers and the distances between them. When the Secretary of War established the pier line 700 feet outshore of the bulkhead line, this was done in order to permit the building of long piers and the mooring of vessels at the sides of the piers. If there were no restriction with respect to the location or width of piers, the entire space between the bulkhead and pierhead lines might be covered by wharf structures, thus effectually preventing the use of any part of them other than their outshore ends. The determination of the questions respecting the location of piers and the spaces between them has been left to the State, and the State has provided the necessary regulations.

The uniform custom throughout the harbor of New York has been for the Secretary of War to establish bulkhead and pierhead lines, and for the State to provide regulations respecting the location of piers between the two lines laid down by the Secretary. The latter is more or less a matter of local concern, while the laying down of the major lines (the bulkhead and pierhead lines) determines

the width of the Channel and is of more general concern.

It has also been the uniform custom in the harbor of New York to place piers at the foots of streets which intersect the shore line. What more natural location could there be?

The plaintiffs admit that they are bound by the lines laid down by Congress through the instrumentality of the Secretary of War. Why then are they not equally bound by the regulations of the State of New York through the instrumentality of the officials selected by its legislature?

The regulatory acts of the State affect all. All must use their property in the manner provided by the regulatory authority. All land under navigable water is subject to regulation with respect to the manner of its improvement. This is absolutely necessary in order that proper provision may be made for navigation. If one owner gains and another loses by the exercise of the State's regulatory power, this is merely incidental. All general regulations similarly help one and hurt another. The only proper consideration in matters of this kind is for the needs of the general public. The State's power, within its proper sphere, must be as great as that of the Federal government. True, the State may not permit improvement where the Federal government forbids. But the State may further restrict within the area as to which the Federal government has manifested its indifference. No one may extend a pier beyond the Federal pierhead line. But the State may say that, within such line, the piers must be so far apart or only in certain specified locations.

The lands in question, lying as they do beneath the waters of the Hudson River, are subject to the public right of navigation. The plaintiffs, of

course, have the right to bring in vessels and unload them upon their filled land. The lessees of the adjacent piers, likewise, have the right to bring in vessels and moor them alongside of these piers. Because of the action of the public authorities, the lands in question may not be filled, but must remain under water. It necessarily follows that they may be navigated by the public, by the plaintiffs, and by the defendant.

It has often been stated that the State may grant land under water in such a manner and under such circumstances that the grantee becomes a proprietor to the same extent as a proprietor of upland. This may be true where the land under water granted consists of shallows unsuitable for general navigation, and where the grantee has actually filled in the lands and made upland of them. This is the situation with respect to so much of the lands granted to plantiffs' predecessors as lie east of Twelfth Avenue. They have been filled in and are now as much part of the upland of Manhattan Island as any other portion of that Island. No one questions this. It may be conceded, as a general proposition, that where an owner has lawfully filled in land under water with the consent of both the Federal and State authorities it become upland, free from the trust subject to which land under water is held, and free from the regulatory power of the State over navigable waters. Judge Pound recognized this principle in the case at bar, when he said:

> "If plaintiffs' lands easterly of the bulkhead line had been actually filled in, they would no longer be lands under water, and would be free from the regulatory power of the State."
> 235 N. Y., at pp. 361, 362.

The consent of the Federal and State authorities is evidenced by the establishment of bulkhead lines, lines to which solid filling is permitted. By the establishment of such lines, the authorities define the limits of a navigable waterway. In permitting the conversion into upland of land under water inshore of a bulkhead line, navigation is not interfered with nor obstructed. On the contrary, it is facilitated. Modern commerce could not be accommodated in a harbor which remained in its natural condition, with sloping beaches and mud flats along its edge. By permitting filling out to a reasonable depth of water vessels are enabled to moor alongside the shore or at piers extending therefrom.

Outshore of the bulkhead line, however, we are in navigable waters. Here, every private right is subordinate to the rights of the public. All ownership is subject to public regulation. No right, whether of ownership or otherwise, can be granted which will prevent the full and free exercise of the regulatory power of Congress and of the State.

This is all that the courts have held in the case at bar. With respect to the filled lands inshore of the bulkhead line, it is conceded that the regulatory power no longer exists, for they are no longer part of the navigable waters of the River. They have become upland. Outshore of the bulkhead line, however, no structure may be placed without the approval of the authorities. The Secretary of War has limited the distance to which piers may be extended; the State has prescribed their location and width. This is neither a taking of property nor an infringement of the plaintiffs' granted rights. It is an exercise of sovereign power to which all land under navigable waters is subject.

Prosser vs. Northern Pacific R. Co., 152 U. S., 59;
Greenleaf Johnson Co. vs. Garrison, 237 U. S., 251.

No property of the plaintiffs has been taken. Their grants from the City have not been impaired. The New York courts have held that these grants do not convey as unqualified a title as would be conveyed by a grant of upland. The lands granted have been held to be subject to the regulatory power of the Federal and State governments. As we shall show under Point II, this doctrine is not at all at variance with the decisions of this court, and, even if it were, it is sufficiently supported by reason to survive the test applied in cases of contract impairment.

"In such circumstances, although we construe the constitution for ourselves and determine the existence or non-existence of the contract set up and whether its obligation has been impaired by the State enactment, *Douglas vs. Kentucky*, 168 U. S., 488, 502, 'the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt,' a principle reinforced by the later cases."

Tampa Water Works vs. Tampa, 199 U. S., 241, 243-244.

"Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their constitutional rights under the guise of construction, still the mere fact that without the State decision we might have

hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

Southern Wisconsin Ry. vs. Madison, 240 U. S., 457, 461;
Milwaukee Elec. Ry. vs. Milwaukee, 252 U. S., 100, 103.

Upon the prior argument, there was some discussion of the following statements in the opinions of the Court of Appeals:

"The establishment of the bulkhead line does not conflict with the right of the City in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without re-acquiring the title which it has authorized the City to convey to private owners."

235 N. Y., at p. 363.

" * * * The title of relators to lands actually under water is subject to the rights of the City to improve the same for the purposes of navigation but that the City must reacquire the property rights in the land under water which it has conveyed before it can carry out its plans for such improvement."

235 N. Y., at p. 366.

These statements are not in any manner inconsistent with the determination of the court to the effect that the City had not violated any of the righs of the plantiffs. The court held, in *Matter of Appleby vs. Delaney* (No. 16 in this court) that the attempt of the State authorities in 1916 to move back the bulkhead line was futile. What the court

had in mind in making the above quoted statements is that, if the City desired to carry out its plan of moving back the bulkhead line and building a marginal wharf, as shown by the map opposite page 58 in the record in No. 16, it would have to exercise the power of eminent domain. Furthermore, if the City is itself to construct and utilize the bulkhead and marginal wharf at the new location, it will have to pay the plaintiffs for the extinguishment of their bulkhead rights.

Another case in which the City might be required to compensate the plaintiffs is illustrated by the map opposite page 62 in the record in No. 16. This plan shows a proposed pier in what is now the slip or basin between West 40th Street, and West 41st Street. Such pier, if constructed by the City, would in part occupy the lands granted to the plaintiffs. This would clearly constitute a taking of the plaintiffs' lands and could be justified only by the exercise of the power of eminent domain.

On the other hand, merely navigating vessels over what is and must remain land under water, and dredging navigable waters for the benefit of commerce, do not amount to an appropriation.

POINT II.

Questions concerning the rights of grantees of lands under navigable waters are purely local; moreover, the doctrine of the New York courts is in accordance with the decisions of this court in similar cases.

Martin vs. Waddell, 16 Pet., 367;
Shively vs. Bowlby, 152 U. S., 1 (see pp. 20 to 21 where the law of New York is discussed).

In the last named case the court stated:

> "The later judgments of this court clearly establish that the title and rights of riprarian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution."
>
> 152 U. S., at p. 40.

> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign for the benefit of the whole people."
>
> 152 U. S., at p. 57.

See

Philadelphia Co. vs. Stimson, 223 U. S., 605, at p. 632.

In the recent case of *Port of Seattle vs. Oregon R. R. Co.*, 255 U. S., 56, it was held that questions respecting the extent of the rights granted in conveyances by a State either of lands abutting upon navigable waters or of tide lands (lands under water) are wholly matters of local law. The court stated among other things:

> "The proprietary right of the State over navigable waters and of the soil thereunder is

> neither exhausted nor impaired by making a sale of a tract of tide land, be it the parcel nearest the upland or some other."
>
> 255 U. S., p. 65.

The plaintiffs refer to the case of *Packer vs. Bird*, 137 U. S., 661. That case dealt with a grant made by the Federal government, and it was there held that the courts of the United States will construe such a grant without reference to the rules of construction adopted by the States. It was also held that whatever incidents or rights attach to the ownership of propery conveyed by the government may be determined by the State law, subject to the condition that their rules do not impair the efficacy of the Federal grant.

In *Sanitary District vs. United States*, 266 U. S., 405, the court dealt with the question of the right of a political subdivision of the State of Illinois to divert water from Lake Michigan by means of a canal uniting the waters of the Lake with the Illinois River. It was contended that the State had this right under an act of Congress passed in 1827. With respect to this contention the court wrote:

> "But the defendant says that the United States has given its assent to all that has been done and that it is estopped to take the position that it now takes. A State cannot estop itself by grant or contract from the exercise of the police power. *Texas & New Orleans R. R. Co. vs. Miller*, 221 U. S., 408, 414; *Atlantic Coast Line R. R. Co. vs. Goldsboro*, 232 U. S., 548, 558; *Denver & Rio Grande R. R. Co. vs. Denver*, 250 U. S., 241, 244. It would seem a strong thing to say that the United States is

subject to narrower restrictions in matters of national and international concern."

266 U. S., at p. 427.

In *Greenleaf Johnson Lumber Co. vs. Garrison*, 237 U. S., 251, it appeared that the complainant had constructed an improvement in the waters of the Elizabeth River consisting of two fills, with the outer extremities connected, thus making a three sided wharf with a log pond in the centre. This improvement was entirely inshore of a harbor line adopted by the Secretary of War in 1890. In 1911 the Secretary established a new line farther inshore, cutting off about 200 feet of complainant's structure. This court held that the complainant was obliged to comply with the new line and remove the portions of his wharf extending beyond it, and that the action of the public authorities was not a taking of property, but the lawful exercise of a governmental power for the common good.

In *Lewis Blue Point Co. vs. Briggs*, 229 U. S., 82, it was held that an owner of land under water had no right to complain of the action of the public authorities in dredging a channel, although it destroyed his oyster plantation. The court, among other things, stated:

"That case and the later one cited fail to recognize the qualified nature of the title which a private owner may have in the lands lying under navigable waters. If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use

the bed of the water for every purpose which is in aid of navigation. This right to control, improve, and regulate the navigation of such waters is one of the greatest of the powers delegated to the United States by the power to regulate commerce. Whatever power the several States had before the Union was formed, over the navigable waters within their several jurisdictions, has been delegated to the Congress, in which, therefore, is centered all of the governmental power over the subject, restricted only by such limitations as are found in other clauses of the Constitution.

"By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands, or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep-water channel across it, entitles him to demand compensation as a condition."

229 U. S., pp. 87-88.

The courts of New York have construed the plaintiffs' grants in accordance with the foregoing opinions of this court, and have held them to be subject to the State's regulatory or police power, to be exercised for the common good. They have applied to the ownership of land under water a limitation of the same character as that applied by this court with respect to the powers of Congress. The exercise of this power by Congress does not preclude the exercise of similar power by the State

(*Montgomery vs. Portland*, 190 U. S., 89). It has accordingly been held that ownership of land under water is subject to the exercise of the regulatory powers of both the Federal and State governments.

The decision in the case at bar is a mere reiteration of the doctrine set forth by this court when, in *Shively vs. Bowlby*, it stated the law of New York as follows:

> "The owner of the upland has no right to wharf out without legislative authority; and titles granted in lands under tide water are subject to the right of the State to establish harbor lines. *People vs. Vanderbilt*, 26 N. Y., 287, and 28 N. Y., 396; *People vs. N. Y. & S. I. Ferry Co.*, 68 N. Y., 71."
>
> 152 U. S., p. 21.

POINT III.

The piers and sheds at the foot of 39th, 40th and 41st Streets are lawfully maintained.

Plaintiffs contend that the piers in question are in the beds of public streets and constitute a diversion of the same from street uses. This contention overlooks the fact that, under regulations both of the Federal and State governments, there may be no solid filling beyond a point about 150 feet west of Twelfth Avenue. Where there can be no solid filling, obviously there can be no public street.

As we have heretofore stated, the scheme of development contemplated by the City's grants to the plaintiffs' predecessors was frustrated by the establishment of the bulkhead line. This prevented

further filling. It limited the plaintiffs' right to gain land from the River, and also relieved them from the performance of the consideration, namely, the building and perpetual maintenance of the streets beyond the bulkhead line.

Plaintiffs complain that we have built piers instead of streets. Any structure except a pier would be a violation of governmental regulations, a purpresture, a nuisance and a crime against the United States.

> *Peo. vs. Vanderbilt*, 26 N. Y., 287; 28 N. Y., 396;
> *Philadelphia Co. vs. Stimson*, 223 U. S., 605, 622.

The construction of piers between the bulkhead and pierhead lines being lawful, no great hardship was visited upon the plaintiffs when the City, at its own cost, built these piers. As the plaintiffs may not fill in the land under water beyond the bulkhead line, there is no hardship in permitting the City to float vessels over it and moor the vessels at its piers. The plaintiffs may also navigate these waters, and have a right of access over them to their land and *vice versa*.

In other words, the best has been made of the situation resulting from the limitation of the right to fill. The unfilled lands are being utilized in the only manner possible; and the plaintiffs have the same right along the outshore edge of the filled lands as they would have had along the westerly side of Thirteenth Avenue, if that avenue had been built.

POINT IV.

The lands under water in controversy may be dredged to facilitate navigation.

Lands under navigable waters may be dredged, to facilitate navigation, without any liability to the owner of the fee of the underlying lands.

Lewis Blue Point Co. vs. Briggs, 198 N. Y., 287; aff'd. 229 U. S., 82;
Tempel vs. United States, 248 U. S., 121.

POINT V.

The affirmance by the Court of Appeals does not carry with it any approval of the conclusions of law made by the Appellate Division.

Throughout the entire brief submitted by the plaintiffs in error upon the prior argument, great emphasis is laid upon the fact that the Appellate Division made certain conclusions of law with respect to the legal effect of the City grants and the rights of the plaintiffs thereunder. It is repeatedly stated that the Court of Appeals, by affirming the judgment, adopted these conclusions, that they are "the law of the case," and amount virtually to an adjudication which required the court to grant the relief asked for in *Appleby vs. Delancy* (to be argued herewith as No. 16).

All this is based upon a wholly erroneous assumption with respect to the powers, jurisdiction and practice of the New York Court of Appeals. The fundamental defect in this process of reasoning lies in the fallacy of the proposition that an

affirmance by the Court of Appeals amounts to an approval of the conclusions of the court below.

The practice in equity in New York requires the parties to submit to the court "requests to find" propositions of fact and law, which the court is required to pass upon (Civil Practice Act, Section 439). The decision of the court "must state separately the facts found and conclusions of law, and direct the judgment to be entered thereon" (*Idem*, Sec. 440).

Prior to a recent amendment hereinafter noted, no appellate court could change the "decision" of the court below, consisting of the findings of fact and conclusions of law.

> *New York Bank Note Co. vs. Hamilton Bank Note Co.*, 180 N. Y., 280; pp. 290-291, 297.

The appellate court could, of course, affirm, reverse or modify the *judgment*. But its power did not extend to a modification of the *decision*. If it concluded that the judgment was correct, despite errors in the decision, it could still affirm by disregarding the errors.

> *Knox vs. Metropolitan R. Co.*, 58 Hun, 517; 523-4;
> *London vs. Martin*, 79 Hun, 229.
> *Wetmore vs. Bruce*, 118 N. Y., 319; 323-324;
> *Ostrander vs. Hart*, 130 N. Y., 406, 413;
> *Appleton vs. City of New York*, 219 N. Y., 150.

If the errors in the decision were of so serious a nature that they could not be disregarded, the

appellate court would have to reverse the judgment and grant a new trial.

N. Y. Bank Note Co. vs. Hamilton Bank Note Co., 180 N. Y., at pp. 290-291.

By a recent amendment of the applicable statutes, the Appellate Division has been given power to make a new decision, new findings of fact, and new conclusions of law.

Lamport vs. Smedley, 213 N. Y., 82.

As a result of this change in practice, it has been held that, where a decision or a finding is not changed by the Appellate Division, that court must be considered to have approved such decision or finding.

Rives vs. Bartlett, 215 N. Y., 33, 38-39.
Beatty vs. Guggenheim Exploration Co., 223 N. Y., 294, 303.

The Court of Appeals, however, has never been given the power to change a decision or finding of the lower court. It still has power to affirm, modify or reverse a judgment. But with respect to the findings, it must take them as they are. If it reverses the judgment, of course the decision falls. But, as we have stated, the Court of Appeals may disregard erroneous findings and still affirm the judgment. This it has frequently done. For example, in *Ostrander vs. Hart*, 130 N. Y., 406, the court, at page 413, expressed its disapproval of the conclusions of law made by the court below, as set forth at page 409, but, notwithstanding this disapproval, affirmed the judgment.

In *Appleton vs. The City of New York*, 219 N. Y., 150, the court expressed its disapproval of many of the findings of the court below and yet affirmed the judgment. In the last named case, the plaintiff, fearful of the effect of the affirmance of the judgment upon future litigation, moved for the amendment of the order of the court in such a manner as to specifically reverse the findings which the court had disapproved. The court declined to do this, but, in order to allay the plaintiff's fears, granted the motion to amend "to the extent of inserting therein a statement to the effect that the judgment of the Appellate Division is affirmed solely upon the grounds set forth in the opinion of this court" (219 N. Y., 681). This, of course, was merely a statement of the legal effect of the affirmance.

The number of cases in which the Court of Appeals has disregarded erroneous conclusions of law, when affirming without opinion, is doubtless very great.

Having no power to change any finding or conclusion or to deal specifically with a finding or conclusion in any manner, the Court of Appeals must, when it decides to affirm, either disregard erroneous findings and conclusions altogether, or indicate its disapproval in its opinion. There is no case in the whole series of New York reports in which the Court of Appeals has ever changed a finding or conclusion of law, made a new finding or conclusion, or even specifically reversed one. The most it has ever done is to indicate in its opinion its views with respect to the findings and conclusions.

The clearest explanation of this feature of New York practice is contained in the opinion of the Appellate Division in *Erie R. R. vs. International Ry. Co.*, 209 App. Div., 380, affirmed 239 N. Y.,

598. There it was contended that a conclusion of law contained in a prior judgment affirmed by the Court of Appeals constituted a binding adjudication. The court stated:

> "The legal conclusions reached by a court in making a decision, even in an opinion, are not necessarily adopted and approved on appeal where the decision is affirmed without opinion. Only the right of the party to recover is decided and the court is responsible only for that, not for the reasons given nor opinions theretofore expressed (*Rogers vs. Decker*, 131 N. Y., 490; *Cherrington vs. Burchell*, 147 App. Div., 16; *Simpson vs. New York Rubber Co.*, 80 Hun, 415, 418; 15 C. J., 942). An affirmance may be based on a different theory or on different grounds or on any sufficient ground found in the evidence (4 C. J., 662).
>
> "Courts are required to pass on requests to find when submitted by either party. The statement must be in the form of distinct propositions of law or of fact, or both, separately stated and numbered (Civ. Prac. Act, Sec. 439; formerly Code Civ. Proc., Sec. 1023). These are made for the protection of the court and parties, and to make the case readily reviewable (38 Cyc., 1953). Findings of fact once decided in a matter of litigation between parties and affirmed, become conclusive (Id., 1987). *If the facts warranted a judgment in parties' favor, erroneous conclusions of law are of little importance for an appellate court will ordinarily affirm without regard to erroneous or unnecessary conclusions of law.* It is not strictly necessary that such conclusions of law be made in any particular form, a gen-

eral conclusion that a party recover or have judgment being sufficient (Id., 1978). In *Colonial City T. Co. vs. Kingston R. R. Co.* (154 N. Y., 493, 495) it is said: 'A judicial opinion, like evidence, is only binding so far as it is relevant.' No particular significance is attached to the fact that the parties argued on the former appeal that the 5th conclusion of law would be highly prejudicial to defendant in the future" (Italics ours).

209 App. Div., p. 384.

In the case at bar, the Court of Appeals, in its opinion, plainly expressed its disapproval of the new conclusions made by the Appellate Division, numbered 26 and 27 (R., p. 550). Those numbered 28, 29 and 30, which are so often referred to by the plaintiffs, are wholly irrelevant to the issues in *this action* and, indeed, are based upon facts not in evidence. *In this action*, the plantiffs do not seek to enforce any alleged right to fill in, and the fact of the establishment of a new bulkhead line in 1916 is not before the court. The record shows that, upon a supplemental hearing, the counsel for the City offered in evidence the proceedings relating to the new bulkhead line of 1916 (R., pp. 285-288). The court reserved decision on the admissability of these matters, and, in its opinion, ruled against their admissability (R., p. 364). It is only in *Appleby vs. Delaney* (No. 16 in this court) that the facts with reference to the 1916 bulkhead line are formally before the court. This, of course, furnishes an additional reason why the Court of Appeals, in this case, disregarded the conclusions of the Appellate Division.

When the plaintiffs seek to take advantage of these conclusions as *res judicata* in No. 16 (*Ap-*

pleby vs. Delancy), there is the additional objection that they were not pleaded as such. The petition in the mandamus proceeding (No. 16) contains no reference to any of the proceedings in this action (No. 15).

The Court of Appeals, in deciding this action (No. 15) properly disregarded the new conclusions of law made by the Appellate Division, except to the extent that it expressed its views in its opinion. When it came to decide the mandamus proceeding (No. 16), it expressed its views on the subject covered by these conclusions in no uncertain terms; holding that the new bulkhead line was not binding upon the plaintiffs, but that they could not do any further filling without the consent of the common council.

The judgment should be affirmed.

New York, January 22, 1926.

Respectfully submitted,

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(3166 A)